Respondent be coordinated by the Appellate Court Branch and that the Compliance Officer assists and works closely with the Appellate Court Branch to facilitate a favorable result.

- Continue to monitor the viability of respondent by reviewing any information submitted by the charging party, discriminatee, and/or periodically conduct database searches (AutoTrak), regarding the viability of respondent and begin an investigation if necessary.
- Maintain contact with discriminatees through quarterly requests for information from which backpay could be calculated.
- Update backpay calculations.

10612 Respondent's Compliance with Board Order After Submission of Enforcement Recommendation

If full compliance is obtained or if the Regional Director wants to recommend a suspension or withdrawal of enforcement action, the recommendation should be submitted electronically to the Appellate Court Branch.

10614 Procedures to Follow Upon Issuance of Court Judgment

Actions to obtain compliance with judgments enforcing Board orders should not await the entry of Mandate. If the court only partially enforces the Board order, compliance should ordinarily be sought immediately with respect to the portions enforced. If respondent seeks certiorari, compliance efforts should not be deterred, unless a stay has been granted. If no stay is granted and respondent refuses to comply, the case should be submitted to the Contempt Litigation Compliance Branch, with a copy to the Division of Operations-Management, to initiate contempt proceedings. See also Section 10692.3. The Compliance Officer should initiate compliance action with its remedial provisions as soon as a court judgment issues by:

- Providing respondent with a copy of the judgment and requesting, in a letter, that respondent immediately initiate steps to comply with the judgment, including, but not limited to, posting the Notice to Employees, offering reinstatement, and expunging files. The letter should also ask for any documents that will be needed to calculate backpay or any other monetary remedy.
- Updating backpay calculations.
- Negotiating compliance pursuant to the remedy ordered by the Court.

10616 Noncompliance With a Court Judgment

If respondent fails or refuses to take action required by a court judgment or engages in conduct that violates the negative provisions of a court judgment, prompt action should be undertaken to ensure compliance:

- In cases where respondent refuses to comply with the clear requirements of the judgment (other than the payment of backpay, where the amount owed

has not been liquidated by court judgment) or raises only frivolous defenses to compliance, contempt proceedings are generally warranted. See for example Sections 10530.7, 10616.2, 10624, 10632.1, and 10646.6.

- In cases where respondent's refusal to comply gives rise to a real dispute regarding its obligations under the judgment, the Region may, where appropriate and subject to the provisions of Sections 10616.2, 10632, and 10646, pursue compliance through issuance of a compliance specification. See Section 10646 regarding compliance issues that should be pursued through a compliance hearing and procedures for issuing a compliance specification and conducting a compliance hearing.

10616.1 Allegation of Noncompliance With Court Judgment

If the Region receives a report of noncompliance with a court judgment, the party making the allegation should be asked to specify the defects in compliance and should be asked to submit whatever evidence is available. If there appears to be merit to the allegation, appropriate investigation should be undertaken, including obtaining affidavit or deposition testimony and documentary evidence, if necessary through the use of Section 11 investigative subpoenas. If the Regional Director determines that compliance has been achieved, the procedures set forth in Sections 102.52 and 102.53 of the Board's Rules and Regulations concerning compliance determinations apply. Section 10600.

If the allegation of noncompliance with an affirmative provision is arguably meritorious and is not resolved voluntarily and expeditiously, the Region should submit the matter by memorandum to the Contempt Litigation & Compliance Branch, with a recommendation whether contempt proceedings are warranted. Section 10632.1. See Section 10632.5 regarding criteria for initiation of contempt actions. A copy of this recommendation should also be submitted to the Division of Operations-Management.

Because a finding of contempt requires clear and convincing evidence (rather than a mere preponderance of evidence), the Region's investigation of noncompliance should include testimonial (affidavit or deposition) and documentary evidence whenever possible. In addition to the initial written requests for compliance following issuance of the judgment, subsequent requests for compliance should be confirmed in writing, including any deadlines for compliance or statements that contempt proceedings may be recommended absent compliance.

If it appears that contempt proceedings may be recommended, the Region should document (by maintaining detailed and contemporaneous records) the time and expenses expended to investigate and prosecute the case in order to recoup such fees and costs in the contempt case. Section 10632.8.

10616.2 Allegation of Noncompliance Clearly Encompassed by Affirmative Provisions of the Judgment; New Charge Not Warranted

If the allegation of noncompliance involves conduct clearly encompassed by the affirmative provisions of the judgment, the filing of a new charge probably will not be warranted. For example, where the respondent has not complied with a notice posting or expunction requirement, the filing of a new charge would not be warranted because such conduct does not amount to a new unfair labor practice. However, if the conduct

complained of arguably may constitute a new unfair labor practice (for example, a subsequent discharge for union activities), the better course of action is to suggest that a new charge be filed in order to avoid possible 10(b) problems should a decision later be made to process the case administratively, rather than through a contempt proceeding. Section 10616.3.

10616.3 Conduct Not Clearly Covered by an Outstanding Judgment; Possible New Unfair Labor Practice

If the conduct comprising the alleged noncompliance may also constitute a new unfair labor practice, the party raising the allegation should be advised of this and of the possibility that unless a new charge is filed, the expiration of the 10(b) period may preclude the issuance of a complaint should a decision be made that the newly alleged violations are not actionable in contempt (for example, because the supporting evidence does not appear to meet the "clear and convincing" standard applicable in contempt actions). A new charge should be requested when the incident that is the subject of the dispute is not clearly encompassed by the terms of the judgment.

The Region should consult with the Contempt Litigation & Compliance Branch if it has any questions in this regard. Of course, the party raising the allegation may, on its own initiative, file a new charge. The investigation of the allegation of noncompliance and of the new charge should proceed simultaneously.

10616.4 New Charges Filed Against a Respondent Subject to an Outstanding Court Judgment; Withdrawal of Charges Against Respondent Subject to an Outstanding Court Judgment

At any time following the issuance of a judgment, charges may be filed that allege unlawful conduct by a respondent that is subject to an outstanding court judgment. When charges are filed, regardless of whether they are accompanied by a specific allegation of noncompliance with the court judgment and regardless of whether the court judgment resulted from charges filed in another Region, the Region should initially determine whether the respondent is subject to a judgment arguably encompassing the charged conduct. If so, the Region should follow these procedures:

If it is determined that the charge has merit and if the conduct is arguably encompassed by the provisions of the judgment (see Section 10632.5) the matter should be submitted to the Contempt Litigation & Compliance Branch, with a copy to the Division of Operations-Management. The memorandum should contain a Regional recommendation concerning the appropriate course of action, such as issuance of complaint, institution of contempt or alternative proceedings. See Sections 10632, generally, and 10632.6 regarding the contents of such a memorandum. Any doubt whether the allegation is encompassed by the judgment should be resolved in favor of submitting the case for contempt consideration.

Where a charge appears to be arguably meritorious, and there is an outstanding court judgment against the charged party, the Region should consult with the Contempt Litigation & Compliance Branch before approving any withdrawal request.

When the matter has been submitted to the Contempt Litigation & Compliance Branch, the Region should not issue complaint, approve a withdrawal or settle the case

until the General Counsel has decided whether to recommend, and the Board has decided whether to authorize the institution of contempt proceedings.

If contempt is authorized, the Region should take no action on the matter without the authorization of the Contempt Litigation & Compliance Branch. However, the Region may seek authorization from Contempt to proceed administratively, notwithstanding the Board's authorization of contempt proceedings (for example, when the same facts demonstrate violations of different sections of the Act, only some of which are covered by the judgment or when 10(j) or 10(l) relief is needed).

In cases where a Regional dismissal has been appealed, the appeal has been sustained and the Region has been directed to issue complaint, the Region should submit the case to Contempt Litigation & Compliance Branch.

10616.5 Regional Action: New Charge Not Filed

On the basis of the investigation and any consultation with the Contempt Litigation & Compliance Branch, the Region should take appropriate action. For example, the Region may advise the charging party that the terms of the judgment are being complied with or advise the respondent, with confirmation in writing, of action necessary to remedy the defect. If the Region concludes that the respondent is not complying and all reasonable efforts to achieve voluntary and expeditious compliance fail, the Region should submit a memorandum recommending further action, such as contempt or other alternative proceedings, to Contempt, with a copy to the Division of Operations-Management. Regions are encouraged to confer informally with Contempt before formally submitting cases.

10618 Investigation of Noncompliance Allegations

Because a finding of contempt requires clear and convincing evidence rather than a mere preponderance of the evidence, the investigations of allegations of non-compliance should be especially thorough. Regions should make appropriate use of investigative subpoenas ad testificandum and duces tecum where necessary. Where the witness is cooperative and forthcoming, a voluntarily-given affidavit normally will be appropriate. On the other hand, where it is expected that the witness will be evasive or testify only under compulsion, a subpoena should be issued and a deposition, rather than an affidavit, should be taken. Depositions may also be appropriate where there are tactical reasons for doing so or where it appears that a net saving of Agency resources will be realized. For example, the Region may take a deposition even of a cooperative witness when doing so will increase the likelihood of settlement.

10618.1 Issuance of Section 11 Subpoenas

Regional Directors are authorized to issue Section 11 subpoenas, both ad testificandum and duces tecum, to investigate allegations of noncompliance with a judgment enforcing a Board order. Clearance from the Division of Operations-Management is required only where the Region wishes to issue the subpoena regarding matters covered in a pending (that is, issued but not yet litigated) compliance specification or where a serious claim of privilege is likely to be raised. Regions should maintain a log which may be in electronic format that lists for each investigative subpoena issued:

- the name of the case and the date of issuance,
- the name of the party or witness to whom the subpoena is directed,
- the evidence sought; the date of issuance,
- a brief description of the basis for issuance, and
- a notation of any petition to revoke and/or enforcement proceedings.

Questions as to whether particular conduct or alleged noncompliance falls within the scope of a judgment should be discussed with the Contempt Litigation & Compliance Branch.

If a Section 11 subpoena is directed to a financial institution seeking the records of an individual or a partnership of five or fewer individuals, the subpoena must comply with the notice and procedural requirements of the Right to Financial Privacy Act, 12 U.S.C. Sec. 3401. The Region should consult with the Contempt Litigation & Compliance Branch before issuing subpoenas for such records. However, the Right to Financial Privacy Act does not restrict the Government's authority to issue administrative subpoenas for the financial records of corporations, unincorporated associations or partnerships other than those comprised of five or fewer individuals, or to issue subpoenas under Fed.R.Civ.P. 45 for records of a party to pending litigation. No prior consultation is required in such circumstances.

If the Region has reason to believe that a claim of privilege will be raised as a defense to the subpoena (for example, when the subpoena is addressed to a medical doctor, an attorney, or a news reporter), clearance should be obtained from the Division of Operations-Management prior to issuance.

In accordance with ULP Manual Sections 11770.6, 11790, and 11790.3, subpoena enforcement problems should be reported to the Division of Operations-Management, with a copy to the Special Litigation Branch and the Contempt Litigation & Compliance Branch.

10618.2 Use of Discovery to Investigate Allegations of Noncompliance

Where a supplemental court judgment liquidating backpay has issued, and has been registered in an appropriate U.S. district court, discovery may be conducted pursuant to Fed.R.Civ.P. 69(a), which incorporates the discovery provisions of Fed.R.Civ.P. 26 through 37 and 45. To facilitate Rule 69 discovery, the Region should register the judgment in an appropriate district court or courts under 28 U.S.C. 1963, as expeditiously as possible, normally within five (5) days of receipt by the Region of certified copies of the judgment.

10620 Notification of Regional Determination

Following the Region's evaluation of the situation and, as provided above, consultation with the Contempt Litigation & Compliance Branch, the Region should take appropriate steps to advise the complaining party that the terms of the judgment are being complied with or advise the respondent, with confirmation in writing, of action necessary to remedy the defect. For example, if the Region finds merit to an allegation of non-

compliance with an expungement remedy, the respondent should be notified accordingly and directed to cure the defect. If the Region concludes that the respondent is not complying and all reasonable efforts to achieve voluntary and expeditious compliance fail, the Region should submit a memorandum recommending further action, such as contempt or alternative proceedings, to Contempt, with a copy to the Division of Operations-Management. Regions are encouraged to confer informally with Contempt before formally submitting cases.

10622 Regional Analysis of Compliance With Cease and Desist Provisions; Recidivism; Potential Contempt Issues

Where respondent has violated a cease and desist provision of an enforced Board order, the Region should consider whether the noncompliance or violation constitutes contumacious conduct, even where the conduct is not ongoing and where the respondent has agreed to refrain from further violations in the future.

If after investigation the Region determines that the conduct arguably violates an outstanding judgment, the Region should submit a recommendation about the propriety of contempt proceedings to the Contempt Litigation & Compliance Branch, with a copy to the Division of Operations-Management. If the Region is in doubt as to whether to recommend contempt, it should consult telephonically with Contempt especially where the respondent's operations extend beyond the Region's boundaries. Where the conduct appears isolated, where no charge has been filed or where the respondent has expeditiously remedied the violation, the Region need only consult telephonically with Contempt.

Where a new charge is filed, see Sections 10616.3 and 10616.4.

10624 Allegations of Noncompliance in Backpay Cases

On refusal to comply with the backpay provisions of a court judgment, the appropriate course of action by the Region will be determined by the status of the case and the nature of the respondent's backpay liability, considered in conjunction with the Region's assessment of any inability-to-pay defense raised by the respondent, as well as derivative liability issues. See Section 10682 for a discussion of derivative liability. As used in this section, "backpay'' refers to any monetary remedy imposed by the Board.

10624.1 Liquidated Versus Unliquidated Backpay Judgment

The court judgment may enforce a Board order containing a generalized "make-whole" remedy or it may state specific amounts of backpay or other monetary awards due to named discriminatees or other entities, such as a benefit trust fund. The latter form of judgment is usually entered only after supplemental backpay proceedings have been conducted, whereas the former determines liability but leaves the amount thereof for future determination. An unliquidated make-whole order is generally too indefinite to serve as a basis for collection proceedings or to create a judgment lien against the respondent's property. However, in appropriate circumstances (for example, where a respondent is improperly dissipating assets or otherwise acting to render itself incapable of compliance), it may be appropriate to initiate action to obtain pendent lite relief, including a protective restraining order, pursuant to Section 10(j) or Section 10(e) or the

Federal Debt Collection Procedures Act. See Section 10678 regarding collection procedures.

10624.2 Unliquidated Judgment

Where the only judgment in place is an unliquidated "make-whole" judgment, the Region normally should take steps to obtain a liquidated judgment by obtaining a supplemental Board order and then referring it for enforcement. In many cases, such a judgment can be obtained by summary proceedings. In such cases, the Region should attempt to ensure that the Board order set forth on its face the total amount of money due, including interest to as late a date as can be computed, and not simply make reference to an earlier administrative order. However, if it appears, on the basis of investigation, that there is no reasonable likelihood of collection from either respondent or any potentially derivatively liable entity, the Region may submit to the Contempt Litigation & Compliance Branch, with a copy to the Division of Operations-Management, a recommendation that the case be closed administratively. Section 10694.9.

10624.3 Liquidated Judgment

In the event respondent refuses to comply with a liquidated judgment, the Region should proceed as set forth below in Section 10678 to undertake collection action. Collection proceedings are the preferred means of achieving compliance with a liquidated judgment.

10624.4 Contempt Proceedings to Compel Payment:

The Region should recommend the institution of contempt proceedings after the issuance of a liquidated judgment to compel payment only if:

- Collection proceedings have failed or would likely prove futile, and circumstances indicate a likelihood of at least some meaningful recovery in contempt;
- The Region has acquired clear and convincing evidence that some person or entity is derivatively liable; and/or
- Respondent has actively evaded compliance through concealment or dissipation of assets, or other exceptional circumstances that warrant proceeding in contempt or under the fraudulent transfer provisions of the Federal Debt Collection Procedures Act (FDCPA).

10626 Financial Inability to Pay Raised as a Defense

A respondent claiming financial inability to comply with the provisions of a judgment bears the burden to show categorically and in detail why it is unable to comply in any way. The Board will need to show at least some ability to comply in order to obtain a meaningful remedy in contempt. Whenever respondent asserts financial inability to pay, the Region should promptly and thoroughly investigate respondent's financial condition, including but not limited to the following:

- a review of financial statements provided to third parties, bookkeeping records such as cash receipt and disbursement journals, banking records (including cancelled checks and deposit instruments), and tax records,

- respondent's assets and encumbrances thereon, and
- any possibility of piercing the corporate veil, setting aside fraudulent conveyances, or otherwise establishing the liability of owners, managers, affiliated entities, or others.

Additionally, the Region should fully investigate and assess the respondent's ability to satisfy its obligations under the judgment by installment payments.

See Sections 10508.5–10508.7 regarding methods and resources for investigating a respondent's ability to pay. See Section 10636 regarding criteria for accepting installment payments.

10626.1 Investigating an Inability to Pay Assertion

Respondents may claim a financial inability to pay backpay or other liabilities arising from unfair labor practice proceedings. In order to facilitate the ultimate satisfaction of backpay liabilities, either through collection or contempt, the Region must be prepared in all such cases to thoroughly investigate respondent's financial condition. See Section 10626 for further discussion of this topic in the context of a post judgment case.

The investigation should consider levels of activity, revenues and expenses in order to evaluate current income or losses. Assets should also be reviewed. During the investigation, the Region should be alert as well for large, unsubstantiated expenses, transfers of assets, or other indications that the respondent is removing assets or seeking to render itself incapable of paying liabilities. Finally, the Region should, as necessary, obtain testimony and documents from all witnesses having relevant information, including respondent's owners, officers, managers, accountants, tax preparers, regulators, customers, and suppliers, where necessary utilizing Section 11 subpoenas, and/or U.S. district court subpoenas issued pursuant to Rule 69 of the Federal Rules of Civil Procedure if a supplemental judgment has been registered in the district court. Sections 10508.5, 10508.6, and 10508.7.

Regions are encouraged to consult with the Contempt Litigation & Compliance Branch to obtain advice and assistance with respect to such investigations.

Based on the results of the investigation and the stage of unfair labor practice proceedings, it may be appropriate to recommend one or more of the following actions:

- Compliance proceedings to fully liquidate respondent liabilities. Section 10646.
- When backpay has already been liquidated in a court judgment, collection proceedings. Section 10678.
- Initiation of contempt proceedings. Section 10632.
- Initiation of injunctive proceedings to protect against the dissipation of assets or the respondent otherwise rendering itself incapable of complying. Section 10674.2.

- Initiation of compliance proceedings to establish derivative liability or to pursue payment from third parties. Sections 10648.3 and 10682.
- Settlement of backpay based on an installment payment agreement. Section 10636.
- Administrative closure of the case, based on the conclusion that the respondent is defunct and totally incapable of paying any liabilities. Section 10694.9.

10626.2 Determination of Inability to Pay

If the Region is satisfied that the respondent has no assets available and that there are no other potential sources for obtaining satisfaction of the judgment, and the case is otherwise appropriate for closing, the Region should submit the matter to the Contempt Litigation & Compliance Branch with a recommendation regarding closing the case, using procedures set forth in Section 10694.9, with a copy to the Division of Operations-Management.

10626.3 Determination of Ability to Pay

If, after investigation, the Region determines that respondent has sufficient assets to satisfy or partially satisfy its liability and the amount of the backpay or other financial obligation has not yet been liquidated, the Region should immediately proceed to obtain a supplemental Board order and judgment liquidating the amounts due. Section 10646. Where the circumstances so warrant, the Region should take appropriate steps to obtain interim relief under Section 10(j) or prejudgment relief under 10(e) or Section 3101 the FDCPA. Section 10676. Upon the issuance of a supplemental judgment, the Region should undertake collection action as set forth in Section 10678.

10626.4 Inability to Make Determination

In the event that the Region is unable to determine whether assets are available, unless it appears that there is no realistic prospect of recovering from the respondent or any potentially derivatively liable entity, the Region should initiate or continue backpay proceedings to obtain a liquidated judgment. While backpay proceedings are going forward, the Region should continue to investigate to determine the respondent's financial condition and to identify assets from which the judgment can be satisfied. Investigation should be conducted to uncover any concealed or fraudulently transferred assets and to identify additional entities or individuals that may potentially be held liable for backpay. An investigation may be conducted regarding third parties, insofar as it relates to the existence or transfer of the respondent's assets and other bases for imposing derivative liability, as well as potential garnishees to satisfy the monetary judgment. Should the Region at any time identify an additional party or parties that potentially may be liable for backpay, the Region should consult with the Contempt Litigation & Compliance Branch to promptly and fully consider the efficacy of naming such parties as additional respondents in contempt or other appropriate proceedings. (Should the Region determine it is necessary to add additional respondents to a backpay proceeding, it may consult with Contempt.)

10628 Noncompliance Assertions Relating to Reinstatement

In the event an allegation of noncompliance or any controversy involves a reinstatement issue, the Region should investigate the matter. Absent expeditious and satisfactory resolution of the issues, the Region should submit the case to the Contempt Litigation & Compliance Branch, and provide a copy to the Division of Operations-Management, with a recommendation as to whether contempt proceedings are warranted to achieve compliance with the Board's reinstatement order. Examples of reinstatement issues include: discriminatee has not received a valid offer of reinstatement from the respondent; discriminatee has not been validly reinstated by the respondent; or the respondent refuses to offer reinstatement for discriminatee based on asserted lack of work or unfitness of discriminatee to work.

As noted in Section 10530.7, the matter should be submitted even when there appears to be a legitimate factual or legal controversy surrounding the reinstatement issue. Where the facts clearly show insufficient basis for initiating contempt proceedings, telephone consultation with the Contempt Litigation & Compliance Branch may suffice.

In such cases, the Region should continue to conduct whatever investigation is necessary in order to compute backpay and to prepare a compliance specification. However, the Region should defer issuance of a compliance specification until the General Counsel has decided whether to recommend, or the Board has decided whether to authorize, contempt proceedings.

10630 Responsibility for Supreme Court Proceedings

In the event that a United States Court of Appeals judgment fails to enforce a Board order in whole or in part, the decision as to further action, including Supreme Court action, will be made by the Board with the recommendation of the General Counsel. The Region will be advised of the decision and will then advise the parties.

10632 Contempt and Other Post Judgment Proceedings

10632.1 Contempt Overview

When a respondent fails or refuses to comply with either the affirmative (other than backpay, where the amount has not yet been liquidated by a court judgment) or negative (cease-and-desist) provisions of a court judgment (Sections 10616.1 and 10622), or when the Region concludes that new charges alleging conduct arguably encompassed by the provisions of a court judgment have merit (Sections 10616.1 and 10616.2), the Region should submit the matter to the Contempt Litigation & Compliance Branch, with a copy to the Division of Operations-Management, with the Region's recommendation as to whether contempt proceedings should be instituted. For backpay cases and reinstatement issues, see Sections 10624 and 10628.

10632.2 Contempt Instituted by Private Parties

No court has ever permitted a private party to institute contempt proceedings to compel compliance with a judgment enforcing a Board order. Accordingly, whenever a party to the case has filed, or indicates that it intends to initiate its own contempt proceedings with the court, the Region should immediately notify the Contempt Litigation & Compliance Branch, with concurrent notification to the Division of Operations-Management.

10632.3 Notice to Parties

Before recommending the institution of contempt proceedings, the Regional Director should normally notify the respondent of the Region's contempt recommendation. However, discretion should be utilized: there are clearly some circumstances that make such notice inadvisable, such as when there is a substantial risk that the respondent, if notified of the possibility of contempt proceedings, will dissipate assets. If the Region is uncertain whether to provide such notice, it may consult with the Contempt Litigation & Compliance Branch.

10632.4 Compliance Developments After Submission of Contempt Recommendation

Any substantial change or progress with respect to compliance following the Region's submission of its recommendation regarding contempt should promptly be reported to the Contempt Litigation & Compliance Branch, and confirmed promptly by memorandum.

Whenever contempt or other ancillary proceedings have been recommended or are pending and a new charge is filed against the same respondent or a related party, the Region should immediately notify the Contempt Litigation & Compliance Branch and the Division of Operations-Management. If the charge is meritorious, the Region should act on it in the manner set forth in Section 10616.4. If the Region determines that such a charge is not meritorious, the Region should notify Contempt by memorandum, with a copy to the Division of Operations-Management, of its determination and supporting reasons before advising the parties of its determination and its intention to dismiss the charge.

10632.5 Criteria Governing Choice Between Contempt or Further Administrative Proceedings

Each case, of course, should be judged on its own merits. Although no single factor discussed below should be considered conclusive; the Region should evaluate each in determining whether to recommend the institution of contempt proceedings. The Region is encouraged to consult informally with the Contempt Litigation & Compliance Branch before formally submitting a case.

10632.5(a) Whether the Alleged Violation is Covered by the Judgment

An enforced Board order is in the nature of an injunction, enforceable by contempt proceedings in the issuing court. Enforced cease-and-desist orders are not limited in their duration and there is no limitations period within which an action for

contempt must be brought. The initiation of a contempt proceeding does not reopen for reconsideration the validity of the underlying order.

A narrow (like or related) cease-and-desist order will ordinarily encompass any future conduct that violates the subsections of the Act involved in the underlying case. On the other hand, a broad (in any other manner) cease-and-desist order may reach all future violations. In addition, Board orders are generally considered to be limited in geographic scope, at least in the absence of some explicit statement to the contrary. Finally, conduct may fall outside the subsections involved in the underlying case and yet still violate a like or related order, for example, where an employer attempts to undermine a bargaining order by discharging leading union adherents.

Where there is an outstanding judgment arguably covering the alleged violation, a contempt recommendation is warranted, even though the violation is not identical to or does not grow out of, the offense or dispute in the underlying case. In considering alternative courses of action against the respondent, the scope of the issues in the underlying litigation should be broadly construed and the full natural meaning given to the language of the order.

10632.5(b) Whether the Evidence Meets the Standard of Proof for Establishing Contempt

The evidentiary standard for establishing proof of civil contempt is "clear and convincing" evidence. This has been described as an intermediate standard, lying between "mere preponderance" (civil) and "beyond a reasonable doubt" (criminal) standards. The standard in criminal contempt proceedings, however, is proof "beyond a reasonable doubt." Thus, the evidentiary burden is heavier in contempt than in administrative proceedings, although the legal standard is the same. In civil contempt, a respondent's good faith or lack of willfulness is not a defense.

10632.5(c) Whether More Extensive Remedies, Available (Only in Contempt) Are Deemed Necessary to Ensure Compliance or Whether Board or Other Available Proceedings Will Be More Successful or Expeditious Than Contempt in Achieving Compliance

When the respondent is a recidivist or has engaged in particularly egregious or widespread misconduct, the "stronger medicine" of contempt is prima facie warranted.[145] Prospective noncompliance fines, reimbursement of costs and attorney fees, detailed bargaining requirements, reading and mailing of notices, compensatory damages (if any), and other remedies not available or normally granted in administrative proceedings, are generally imposed by the courts in contempt cases.

Conversely, although the refusal of a respondent to furnish payroll records to compute backpay is clearly contumacious, ultimate satisfaction of the make-whole order normally will be achieved more expeditiously if the Board forgoes contempt in such circumstances and instead either obtains the records through issuance of Section 11

[145] *NLRB v. Crown Laundry & Dry Cleaners*, 437 F.2d 290, 294 (5th Cir. 1971). See also *NLRB v. Electrical Workers Local 3 (Northern Telecom)*, 730 F.2d 870, 881 (2d Cir. 1984) (Board has a statutory duty to seek "broader and more stringent remedies" against a repeat offender); *NLRB v. Florida Steel Corp.*, 648 F.2d 233, 240 (5th Cir. 1981); *NLRB v. Operating Engineers Local 825*, 430 F.2d 1225, 1230 (3d Cir. 1970); *Steelworkers (H. K. Porter Co.) v. NLRB*, 363 F.2d 272, 275 (D.C. Cir. 1966) (a "succession of proceedings resulting in Board orders cast in statutory language is not the answer" when interference with protected rights persists).

subpoenas, or issues a compliance specification based on secondary sources respecting employee earnings or the Region's own best approximation. Section 10618. Finally, contempt will likely be the only recourse when the alleged conduct violates the affirmative, nonmonetary provisions of a decree but not the Act (for example, notice posting, reinstatement, expungement of files, restoration of status quo ante, and execution of contract) or when the 10(b) period has run without a charge having been filed, inasmuch as the 10(b) limitation applies only to administrative proceedings but not to contempt actions.

10632.5(d) Whether Compliance With a Liquidated Backpay Judgment Can Effectively Be Secured Through Collection Proceedings

Collection proceedings are the preferred means of obtaining compliance with a liquidated judgment. See Section 10624.4 regarding circumstances in which contempt proceedings to compel payment may be appropriate, either as an alternative to, or in conjunction with collection proceedings. Collection proceedings normally will be conducted by the Region, with the advice and assistance of the Contempt Litigation & Compliance Branch and other Headquarter's units, as appropriate.

10632.5(e) Whether a Significant Issue Is Peculiarly One For the Exercise of the Board's Expertise

Courts have been reluctant to resolve in contempt proceedings questions implicating representational issues, inasmuch as they are viewed as concerning an area of special Board expertise. Mere complexity of the law, however, is not a reason to forgo contempt proceedings. Nor does the fact that an administrative procedure is available in any way limit the Board's power to seek enforcement of a court decree through contempt proceedings. Rather, the Board's decision to invoke the court's contempt power is in itself an exercise of the Board's discretion in light of its expertise in achieving compliance with its orders.

10632.5(f) Whether the Decree Has Grown Too Stale to Warrant Contempt Proceedings

Judgments enforcing Board orders are permanent in duration and do not lose their efficacy with age. Sustained compliance does not diminish their vitality. "Sustained obedience is just what the law expects."[146] Nevertheless, the age of the decree is to be taken into account and, after a long period of dormancy, a new violation may warrant administrative proceedings rather than contempt, especially if the misconduct is isolated or not egregious. The fact that a judgment is more than a few years old and has not been disobeyed will not, however, by itself, preclude resort to contempt proceedings.

10632.5(g) Whether Immediate Pendent Lite 10(j), 10(l), or 10(e) Injunctive Relief Is Needed; Concurrent Administrative and Contempt Proceedings

In situations where immediate 10(j), 10(l), or 10(e) relief is warranted, concurrent contempt proceedings may not be appropriate because some courts do not favor duplicative litigation. However, there may be reasons for proceeding both administratively and in contempt in a given case, for example, when the facts are

[146] *Walling v. Harnischfeger Corp.*, 242 F.2d 712, 713 (7th Cir. 1957).

identical but the remedial relief sought may differ. Thus, 8(a)(1) conduct may be alleged as violative in the contempt petition while the same conduct is proven to show animus in support of an allegation of an 8(a)(3) discharge in a concurrent administrative proceeding, either because the outstanding decree does not prohibit 8(a)(3) conduct, or the allegation is not supported by clear and convincing evidence. Moreover, in appropriate circumstances, pendent lite injunctive relief may be obtained in conjunction with a contempt proceeding, pursuant to Section 10(e) of the Act.

10632.6 Region's Submissions Regarding Contempt

Regional recommendations to Washington concerning contempt should contain the following:

- A recommendation by the Regional Director, accompanied by an investigative report of the Compliance Officer or other investigating agent.
- The complete investigative (or compliance) file (or a copy).
- A copy of the judgment or judgments alleged to be violated, together with a summary of the litigation history of the respondent (previous contempt adjudications, judgments, unenforced Board orders, formal and informal settlements and non-Board adjustments).
- When contempt is recommended, particularly for failure to comply with affirmative provisions, documentary and/or testimonial (affidavit or deposition) evidence sufficient to constitute reasonable proof of the violation.
- A statement of any defenses raised by the respondent or otherwise anticipated from the circumstances of the case, with the Region's analysis, including a statement of its reasons for believing the asserted defenses are without merit, and any supporting citations underlying the Region's analysis.
- A recital of all efforts made to achieve compliance or to obtain information respecting the status of compliance.
- A statement concerning the existence and status of any related legal proceedings.

10632.7 Notice to Parties of Board Authorization to Institute Contempt Proceedings

On receipt of the Board's authorization to institute contempt proceedings, the Contempt Litigation & Compliance Branch will normally notify the parties in writing.

If the Board does not authorize contempt proceedings, the Region will be notified. If the Region previously notified the charging party and the respondent that it was recommending contempt, it should notify them of the decision not to proceed in contempt. If the charging party requests a written statement of the reasons for the decision not to seek contempt, it should be advised to submit a written request. The charging party should be notified that a copy of a summary statement or detailed explanation, whichever is requested, setting forth the reasons, also will be provided to the respondent and other parties to the proceeding. Upon receipt, the written request should be forwarded to the Contempt Litigation & Compliance Branch for reply.

10632.8 Documentation of Expenses of Investigating Contempt Allegations and Processing Contempt Proceedings

Courts routinely require respondents who have been adjudged in civil contempt to reimburse the Board for its costs and expenses. These include prevailing or market attorney's fees and other personnel costs, incurred by the Region as well as by Washington Headquarter's staff. When the court awards costs to the Board, the Board, through the Contempt Litigation & Compliance Branch, must (unless the amount is agreed on) prepare and submit to the court a verified statement of such costs so that the court may fix the amount of the award. If the respondent contests the Board's claim, the matter may be referred to a special master for hearing. Accordingly, in all cases in which contempt has been recommended or is anticipated, the Region should maintain detailed, contemporaneous and nonblock time records (for example, January 5, 2004 1.5 hours research on reinstatement obligations, 2.0 hours preparing affidavits, and .5 hours conference call to Contempt) of all field personnel reflecting work performed in the "investigation, preparation, presentation and final disposition" of the contempt proceedings. The records should reflect the case name and number; Board agent name; description of work performed; date work was performed; and the time (in 6-minute intervals)[147] spent performing each specific task. Such time records should be maintained separately for each case by each attorney, field examiner, clerical employee, and any other personnel performing work on the case. Copying and other costs should similarly be recorded; and copies of travel vouchers showing travel expenses related to contempt proceedings should also be retained in the case file for future use in supporting the Board's application for an award of costs.

10632.9 Regional Assistance to Contempt Litigation & Compliance Branch

The Regions are expected to render all requested assistance to the Contempt Litigation & Compliance Branch in investigating, preparing for and prosecuting any contempt case. As a result and as time is often of the essence in these matters, the Region and Contempt should prioritize responding promptly to their respective requests for assistance.

10632.10 Notice to Successors of Potential Contempt Liability

To avoid potential problems of proof of knowledge of unremedied contumacious conduct in a *Golden State* successorship situation, whenever it appears that a third party may acquire the business of a respondent at a time when contempt proceedings have been instituted or are being contemplated, the Region should serve the purchaser with written notice of its potential liability as a successor or otherwise, accompanied by a copy of the relevant judgment.

Any unusual circumstances or problems that would militate against such notice should be directed to the Division of Operations-Management, as set forth in Section 10674.3, prior to a recommendation for contempt proceedings, and to the Contempt Litigation & Compliance Branch, following such recommendation.

[147] If time records are maintained in longer intervals, the time should always be "rounded down," to ensure compliance with the 6-minute interval standard utilized by many courts.

10632.11 Closing Case Involving Contempt Proceeding

The Region should obtain clearance from the Contempt Litigation & Compliance Branch before closing a case in which contempt proceedings have been initiated or are under consideration.

10634 Formal Settlement Stipulations

10634.1 Circumstances in Which Formal Settlement Stipulations May Be Appropriate or Necessary[148]

Even though there may be no prior court judgment(s) involving a respondent, Regions should consider requiring a formal settlement stipulation (that provides for the consent entry of a court judgment enforcing the Board's order) in the following circumstances:

- Respondent has a history of committing unfair labor practices.
- Respondent seems likely to repeat or extend its current unfair labor practices.
- Respondent has engaged in serious violence, particularly if it seems likely to continue or to recur, or has committed other egregious or widespread unfair labor practices.
- Respondent's make-whole liability involves a large amount of money and/or an installment payment plan that will extend over a significant period of time.

Notwithstanding a history recidivism and the probability of continuing violations, a respondent may have managed to avoid court judgments against it by repeatedly entering into informal settlement agreements or voluntarily complying with Board orders. In such circumstances, Regions should carefully consider the potential usefulness of insisting upon a formal settlement stipulation to more effectively deter future violations. If a respondent resists entering into a formal settlement stipulation when a Region has concluded that circumstances necessitate it, the Region should persist in advocating that position before the administrative law judge, despite respondent's argument that an informal settlement agreement would suffice, unless developments during the trial have altered the Region's view about the need for the formal settlement stipulation.[149]

With regard to make whole remedies that involve either a large sum or a lengthy installment payment period,[150] liquidation of the amount due through a formal settlement stipulation providing for entry of a Board order and court judgment places the Agency in the best position to promptly effectuate collection in the event of default and provides potential advantages in the event of bankruptcy. Informal settlements providing for installment payments should include appropriate "default" language providing for ex

[148] See ULP Manual Sections 10164 through 10170.

[149] Upon respondent's request, the Region may include a nonadmissions clause in the formal settlement stipulation as this often facilitates respondent's acceptance. See ULP Manual Sections 10164.5 and 10166.4(a).

[150] For a full discussion of installment agreements and security provisions, see Sections 10592.12 and 10636.

parte entry of a Board order and court judgment upon failure of the respondent to comply fully with the terms of the installment payment agreement.[151] Section 10594.7

10634.2 Submission of Formal Settlement Stipulation by E-mail to the Office of the Executive Secretary

Submission of documents to the Office of the Executive Secretary eliminates the need for duplicative typing. Accordingly, Regions should submit by e-mail to the Office of the Executive Secretary, with a copy to the Division of Operations-Management, all formal settlement stipulations for which they seek the Board's approval.

10634.3 Compliance Actions Following a Formal Settlement Stipulation

The Region should undertake action to obtain compliance with a formal settlement stipulation as soon as the Board has issued the corresponding order, unless the stipulation requires installment payments to begin upon execution of the stipulation. In those circumstances, the Region should undertake action to achieve compliance immediately upon execution of the stipulation.

Although the stipulation is subject to Board approval, the language set forth in the stipulation should make it clear that it is effective nunc pro tunc to the date of execution of the stipulation, immediately upon approval by the Board.

10636 Installment Agreements and Security Provisions

As a condition for accepting installment payments, the Region should normally insist on the same security provisions as are commonly required by creditors in ordinary business transactions as protection against default, insolvency, and bankruptcy. The Region should be particularly alert to situations which raise doubt as to the respondent's ability or willingness to make the agreed-on payments and should err on the side of obtaining security provisions in such areas. Additionally, the Region should normally insist upon default language when it agrees to grant respondent an installment payment plan, even where specific security is provided. Section 10594.7 and Appendix 12. All installment payment plans should be in writing.

In obtaining security provisions for installment agreements, the Region may require a bond, letter of credit, mortgage or deed of trust on real property, a promissory note, assignment of contract proceeds, a confessed judgment for the full amount or a personal guarantee by a principal shareholder.

A guaranty agreement should contain a cognovit's (confession of judgment) provision that enables the Board to immediately obtain a judgment against the guarantor in the event of default.

Before accepting a lien or mortgage on real or personal property, the Region should satisfy itself that there is an unencumbered, lienable interest available. A title search and appraisal almost certainly will be required, for which the respondent should be expected to bear the expense. Any U.C.C. Security Agreement should be perfected as provided by state law. It is imperative, therefore, that the Region become fully

[151] See *NLRB v. Centra, Inc.*, Case 91-5236, (6th Cir. 1995), in which the Sixth Circuit ruled that an informal settlement, consisting only of Respondent's statement on the record and never incorporated in a Board order or enforced, could not serve as a basis to find Respondent in contempt when it failed to pay.

conversant with the practice and procedure for perfecting such liens in each state in which the Region has occasion to ensure the perfection of a lien. Regions should consult with the Contempt Litigation & Compliance Branch for assistance in these matters.

Any lien obtained must be perfected in full compliance with state law as soon as possible. Note, that a trustee or debtor in possession may seek avoidance of a lien perfected within the 90 days immediately preceding the filing of a bankruptcy petition. Section 11 U.S.C. § 547.

When a guaranty agreement is otherwise unobtainable or there are no insufficient assets on which to provide meaningful security, or when such an agreement is otherwise unobtainable, an alternative is to obtain a formal settlement stipulation containing a consent court judgment under which liabilities are fully liquidated and installment terms are fully specified.

When the amount agreed to be paid is less than the full amount computed due by the Region, the respondent should be required to agree to pay, and the formal settlement stipulation should specify, the full amount owed, with a proviso that, on payment of all the installments as scheduled, collection of the balance of full backpay is waived.[152] Formal settlement stipulations providing for installment payments should provide for the payment of interest during the installment payment period.

Sample settlement stipulation and security agreement:

Sample formal settlement stipulations that contain provisions for security and an accompanying security agreement, are set forth in Appendices 14 and 15, respectively. A more comprehensive example of sample language for installment payment plans and other security can be found in Appendix 12. In cases where the respondent has no unencumbered assets to offer as security, the security agreement may be omitted and all references to security may be deleted from the formal settlement stipulation.

Where all parties have entered into the agreement, the executed formal settlement stipulation and security arrangement with a cover memorandum recommending approval should be forwarded directly to the Board, with a copy to the Division of Operations-Management. If the agreement is a unilateral formal settlement stipulation, it should be sent to the Division of Advice, with a copy to the Division of Operations-Management, for approval of the General Counsel, who will then submit it to the Board. In either case, in the memorandum, the Region should describe the pertinent details of the settlement, including whether the backpay amount represents the full amount of net backpay that was claimed or would be claimed in a compliance specification, and, if the amount is less than 100 percent, why the full amount was not obtained. ULP Manual Section 10164.8.

10638 Compliance Stipulations

If the Region had at first concluded that a formal settlement stipulation might be required but later determined that it was not needed, i.e., respondent has agreed to fully comply and it appears likely that additional action to obtain compliance will not be needed, the Region may then determine it is nonetheless necessary to set forth in writing the steps respondent has agreed to take in order to comply with a Board order and/or

[152] The last installment being the balance of full backpay.

court judgment and to include default language. Default language avoids the expense and delay that would result if the agreement were set aside and the case is litigated. The use of default language will not prevent litigation regarding whether there has been non-compliance with the terms of the compliance stipulation or whether such noncompliance has been cured. The possibility of such litigation does not outweigh the above-noted benefits, which are likely to result from the use of such language. A stipulation that includes default language may be a practical alternative, which would result in the filing of a motion for summary judgment on the allegations of the compliance specification, in the event respondent failed to comply with the terms of the stipulation. See Appendix 16 for a sample compliance stipulation.

10640 Other Stipulations

In some situations, such as when the amount owed is relatively small, the payment plan is of short duration, the down payment constitutes a significant proportion of the total remedy, the respondent appears likely to comply, and when the respondent refuses to enter into a formal settlement stipulation, but will agree to an informal installment plan, the Region may conclude that a formal settlement stipulation providing for a supplemental court judgment concerning the payment of backpay is not warranted. In such cases, an informal settlement agreement may be appropriate.

10642 Consent Order

Prior to the opening of the hearing, the Regional Director may approve a settlement to resolve a case, whether by means of an informal settlement agreement or a formal settlement stipulation. After a hearing has opened, however, even if both the Regional Director and the charging party oppose a settlement proffered by a respondent, the ALJ has the authority to approve such a "settlement" by "consent order," so long as the respondent's proposal provides a full remedy for the alleged violations.[153] This appears to apply whether respondent's proposed settlement is informal or formal. See *National Telephone Services*, 301 NLRB 1, 1 fn. 2 (1991); *Electrical Workers Local 201 (General Electric Co.)*, 188 NLRB 855, 857 (1971); *Brandt Construction Co.*, Cases 33–CA–12420, 12686 (1999) (not reported in Board volume). However, where the respondent has a history of recidivism and the Region believes that acceptance of an informal settlement does not effectuate the purposes of the Act, an objection should be noted on the record and the Region should consult with the Division of Operations-Management to determine whether an appeal should be promptly filed with the Board pursuant to Section 102.26 of the Rules and Regulations.

10644 Closure of Formal Settlement Cases

In cases where a formal settlement stipulation provides for a Board order and consent court judgment, the case should not be closed until after the decree has been entered, despite earlier full compliance.

[153] The General Counsel or any other aggrieved party may ask for leave to appeal to the Board, as set forth in Sec. 101.9(d)(2), Statements of Procedure, and Section 102.26, Rules and Regulations.